85-719

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

EZRA ELI BORNTRAGER,

Petitioner,

v.

ALEXANDER L. STEVAS, individually, and JOSEPH F. SPANIOL, Jr., substituted for ALEXANDER L. STEVAS, in his official capacity as Clerk of the Supreme Court of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Ezra Eli Borntrager
520 Campbell
Kansas City, Missouri 64106
816/221-5682

Pro se Petitioner

1348

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the plaintiff/appellant/petitioner (hereafter referred to as the applicant) asserted a proper basis for mandamus jurisdiction, to-wit:

   a. Did the applicant establish the elements justifying mandamus relief;

   b. Is there a procedure whereby an applicant can file a motion in this Court to compel the defendant/appellee/respondent (hereafter referred to as the clerk) to accept and process an application for admission to the Court's Bar or does this Court lack original jurisdiction to consider such a motion;

   c. In cases charging violation of Constitutional rights should mandamus be construed liberally;

   d. Is the clerk amenable to the jurisdiction conferred under 28 USC 1361 and in aid of jurisdiction conferred under 28 USC 1651?

2. Whether Section 7 of the "Privacy Act of 1974" is applicable to the case at bar, to-wit:

a. Does Section 7(a) prohibit the clerk's conduct;

b. On application for admission to this Court's Bar, is the clerk required to inform an applicant pursuant to Section 7(b);

c. Did the clerk commit a crime by using, disclosing, or compelling the disclosure of a social security number assigned to applicant;

d. Is Section 7 applicable as a basis for damages against the clerk on the clerk's violation of the applicant's Section 7 rights?

3. Whether the applicant has a claim for money damages against the clerk acting in his official capacity, to-wit:

a. Is it necessary to exhaust the administrative remedies under the "Federal Tort Claims Act", 28 USC 2671,

et seq., before bringing a Bivens action on violation of Constitutional rights;

b. Do the adminsitrative remedies have to be exhausted when it would be futile to do so;

c. Did the clerk acting under color of Federal law deprive the applicant of rights, privileges, and immunities secured by the Constitution and laws of the United States?

4. Whether the District Court has personal jurisdiction over the clerk with respect to the applicant's damage claims asserted against the clerk in his individual capacity, to-wit:

a. Do the Clerk's acts come within the "tortious act" and "transaction of business" categories of Section 506.500, R.S.Mo., and would the exercise of in personam jurisdiction over the Clerk be consistent with due process;

b. Does 28 USC 1391(e) confer personal jurisdiction, in the Western District of Missouri, over the clerk in both his official and individual capacities;

c. Did the clerk waive personal jurisdiction?

5. Whether venue is properly in the Western District of Missouri on an action against the clerk in the clerk's official and individual capacities, to-wit:

a. Do both 28 USC 1391(e) and 28 USC 1391(b) confer venue in the Western District of Missouri;

b. Is the Western District of Missouri the place of injury and, therefore, where the claim arose;

c. Is the convenience of the parties in the Western District of Missouri;

d. Did the clerk waive venue?

6. Whether the Court's finding is not the reasonable inferences to be drawn from the facts?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on August 30, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit will be reported and is produced in Appendix A hereto, infra, page A-1, with its Entry of Judgment produced at page A-10. The opinion of the United States District Court for the Western District of Missouri, Western Division, is unreported and is produced in Appendix B hereto, infra, page B-1, with its Entry of Judgment produced at page B-32.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A, infra, page A-10) was entered on August 30, 1985. The Jurisdiction

of the Supreme Court of the United States is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c), as follows:

28 U.S.C. 1254. Courts of appeals; certiorari, appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

...

(June 25, 1948, ch. 646, 62 Stat. 928.)

28 U.S.C. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under Sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed

from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

...

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, sec. 106, 63 Stat. 104; Dec. 6, 1983, Pub. L. 98-209, sec. 10(b), 97 Stat. 1406.)

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

(Added Pub. L. 87-748, sec. 1(a), Oct. 5, 1962, 76 Stat. 744.)

28 U.S.C. 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, sec. 90, 63 Stat. 102.)

Rule 5. Admission to the bar

.1. It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of the application, and that the applicant appears to the Court to be of good moral and professional character.

.2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other duly authorized official of the proper court evidencing the applicant's admission to practice there and present good standing, and (2) an executed copy of the form approved by the Court and furnished by the Clerk containing (i) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

.3. If the documents submitted by the applicant demonstrate that the applicant possesses the necessary qualifications, the Clerk shall so notify the applicant. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 45(e), the Clerk shall issue a certificate of admission. If the applicant desires, however, the applicant may be admitted in open court on oral motion by a member of the Bar, provided that the requirements for admission have been satisfied."

.4. Each applicant shall take or subscribe the following oath or affirmation:

I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5 U.S.C. 552a note. Disclosure of Social Security Number, Section 7 of Pub. L. 93-579 provided that:

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to-

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regualtion adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

42 U.S.C. 408. Penalities

Whoever-

...

(h) discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States;

shall be guilty of a felony and upon conviction thereof shall be fined not more than $5,000 or imprisoned for not more than five years, or both.

(Aug. 14, 1935, ch. 531, title II, sec. 208, 49 Stat. 625; Aug. 10, 1939, ch. 666, title II, sec. 201, 53 Stat. 1362; Aug. 28, 1950, ch. 809, title I, sec. 109(c), 64 Stat. 523; Sept. 1, 1954, ch. 1206, title I, sec. 111(b), 68 Stat. 1085; Aug. 28, 1958, Pub. L. 85-840, title III, sec. 310, 72 Stat. 1034; Sept. 13, 1960, Pub. L. 86-778. title II, sec. 211(m), 74 Stat. 958; Oct. 30, 1972, Pub. L. 92-603, title I, sec. 130(a), 86 Stat. 1359; Oct. 4, 1976, Pub. L. 94-455, title XII, sec. 1211(a), (d), 90 Stat. 1711, 1712; Dec. 29, 1981, Pub. L. 97-123, sec. 4(a), (b), 95 Stat. 1664.)

28 U.S.C. 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with the regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligence or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: ...

(June 25, 1948, ch. 646, 62 Stat. 983; Apr. 25, 1949, ch. 92, sec. 2(b), 63 Stat. 62; May 24, 1949, ch. 139, sec.

125, 63 Stat. 106; Sept 23, 1950, ch. 1010, sec. 9, 64 Stat. 987; Sept. 8, 1959, Pub. L. 86-238, sec. 1(1), 73 Stat. 471; July 18, 1966, Pub. L. 89-506, sec.'s 1, 9(a), 80 Stat. 306, 308.)

28 U.S.C. 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross claim, or counterclaim.

...

(June 25, 1948, ch. 646, 62 Stat. 983; May 24, 1949, ch. 139, sec. 126, 63 Stat. 107; July 18, 1966, Pub. L. 89-506, sec. 2, 80 Stat. 306.)

506.500. Actions in which outstate service is authorized - jurisdiction of Missouri courts applicable, when.-

1. Any person or firm, whether or not

a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;
(2) The making of any contract within this state;
(3) The commission of a tortious act within this state; ...
...

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(L. 1967, p. 660 sec. 1, A.L. 1984, H.B. 1275.)

28 U.S.C. 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which a defendatnt is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

...

(June 25, 1948, ch. 646, 62 Stat. 935;

Oct. 5, 1962, Pub. L. 87-748, sec. 2, 76 Stat. 744; Dec. 23, 1963, Pub. L. 88-234, 77 Stat. 473; Nov. 2, 1966, Pub. L. 89-714, sec.'s 1, 2, 80 Stat. 1111; Oct. 21, 1976, Pub. L. 94-574, sec. 3, 90 Stat. 2721; Oct. 21, 1976, Pub. L. 94-583, sec. 5, 90 Stat. 2897.)

28 U.S.C. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, sec. 1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, sec. 2, 90 Stat. 2721; Dec. 1, 1980, Pub. L. 96-486, sec. 2(a), 94 Stat. 2369.)

28 U.S.C. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, sec. 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, sec. 12(e), 72 Stat. 348; Apr. 2, 1982, Pub. L. 97-164, title I, sec. 124, 96 Stat. 36.)

CONSTITUTIONAL PROVISIONS

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers, and Consuls;- to all Cases of admiralty and maritime Jurisdiction;- to Controversies to which the United States shall be a Party;- to Controversies between two or more States;- between a State and Citizens of another State;- between Citizens of different States;- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to

Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

...

ARTICLE
[AMENDMENT I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE
[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The (defendant/appellee/respondent) former clerk* of this Court refused to accept and process the (plaintiff/appellant/petitioner) applicant's application for admission to this Court's Bar, on the applicant's refusal for religious reasons to disclose a social security number (record appendix - abbreviated as r. app. - p.'s 2-3,6,68-69,83,98,111-113). On August 1, 1984, applicant filed, in the United States District Court for the Western District of Missouri, his complaint (r. app. p.'s 1-6) against the clerk, in both the clerk's individual and official capacities, alleging that the clerk by not accepting applicant's application for admission deprived the applicant of rights, privileges and immunities secured by the First and Fifth

* All acts complained of were committed by the former Clerk Alexander L. Stevas who was succeeded in Office by Joseph F. Spaniol, Jr., on August 1, 1985, (app. p.'s A-1, A-2).

Amendments of the Constitution and laws of the United States (r. app. p.'s 1,2,3). And, applicant prays: for an order, under jurisdiction of 28 USC 1361 and in aid of jurisdiction 28 USC 1651, directing the clerk to accept and process, without a social security number, applicant's application; for judgment, under jurisdiction of 28 USC 1331, in favor of the applicant for actual and compensatory damages against the clerk in the amount of One Million One Hundred Thousand Dollars ($1,100,000.00); for judgment in favor of the applicant for punitive damages against the clerk in the amount of Five Million Dollars ($5,000,000.00); and for attorneys fees and costs (r. app. p. 5).

Although, the applicant served the clerk with interrogatories (r. app. p. 137) and a request (r. app. p. 137) for production of documents, nothing was done. Other than, the clerk filed a mo-

tion (r. app. p. 137) for a protective order and the applicant filed a motion (r. app. p. 138) to compel, both which were not ruled on. On January 28, 1985, the Honorable Judge Ross T. Roberts, rendered his decision (app. p.'s B-1 - B-31; r. app. p.'s 115-133) on the clerks motion (r. app. p.'s 37-38) to dismiss, or in the alternative, for summary judgment. The Court:

> "ORDERED that defendant's motion for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., shall be and is hereby granted with respect to plaintiff's claims for mandamus relief and for damages against defendant acting in his official capacity, and ... further
> ORDERED that defendant's motion to dismiss plaintiff's complaint, for lack of personal jurisdiction over the defendant with respect to the damage claims asserted against defendant in his individual capacity, shall be and is hereby granted", (app. p. B-31; r. app. p. 133).

On August 1, 1984, David Castro, was on motion of applicant, ordered (r. app. p. 7) appointed to serve process and duly served the clerk in his offic-

ial capacity by: sending a copy of the summons and complaint by certified mail to the Legal Office of the Supreme Court of the United States (r. app. p.'s 11-13), to Alexander L. Stevas (r. app. p.'s 14-16) Clerk of the Supreme Court of the United States, and to William French Smith (r. app. p.'s 18-20) Attorney General of the United States; and by delivering a copy of the summons and complaint to Robert G. Ulrich (r. app. p. 17-17a) United States Attorney. An attempt was made for personal service of process on the clerk by mailing him a copy of the summons and complaint together with notice and acknowledgment forms and a return envelope, postage prepaid, and addressed to David Castro (r. app. p.'s 25-30). However, the clerk did not sign the acknowledgment form until August 23, 1984, (r. app. p. 29), the same day applicant's motion for a special process server, was sustained, ordering (r. app.

p. 21) appointment of Mike Russell of Alexandria, Virginia, as process server to effectuate personal service, of a copy of the summons and complaint on the clerk, which service of process was accomplished on August 24, 1984, by serving the clerk's son Allan Stevas (r. app. p.'s 31-32) at the clerk's dwelling house. Subsequently, on August 27, 1984, process server, David Castro, received from the clerk the signed acknowledgment of receipt of the summons and complaint (r. app. p. 30).

The clerk, on August 17, 1984, filed a motion (r. app. p.'s 8-10) to allow him to answer or otherwise plead to the applicant's complaint through October 1, 1984, thus synchronizing the efforts of the clerk in his individual and official capacities. The motion was unopposed (r. app. p.'s 22-23) by applicant, however, applicant opposed (r. app. p.'s 35-36) the clerk's motion (r. app. p.'s 33-34)

filed on September 27, 1984, for additional time inwhich to answer or otherwise plead to applicant's complaint. The court sustained (r. app. p.'s 24,114) the former motion on August 28, 1984, and the latter on October 26, 1984, after the clerk had filed his motion (r. app. p.'s 37-38) to dismiss, or in the alternative for summary judgment on October 15, 1984, and after the applicant, on October 25, 1984, filed his answer (r. app. p.'s 72-73) and suggestions (r. app. p.'s 74-113) in opposition to the clerk's motions. In his alternative motions the clerk alleged failure "...to meet the prerequisites for mandamus jurisdiction", failure "...to state a claim upon which relief may be granted", and that the "...Court does not have jurisdiction for this action against the defendant", (r. app. p.'s 37-38). No motion (r. app. p.'s 37-38) was made alleging improper venue although lack of venue was asserted

in the clerk's suggestions (r. app. p.'s 62-63) together with a waiver (r. app. p. 62) of venue in the clerk's official capacity and no motion was made to set aside the service of process (r. app. p.'s 37-38).

In the suggestions to the alternative motions the clerk asserted, that had applicant filed a claim with the Administrative Office of the United States Courts under the "Federal Tort Claims Act" "he would have been advised to file a motion to compel the clerk to process his application without a social security number", (r. app. p. 58). Applicant has not filed such a claim under FTCA, (r. app. p. 82). One of the clerk's attorneys telephoned applicant on or about August 23, 1984, and indicated that applicant could file a petition for mandamus relief in this Court as he had filed in the District Court but applicant indicated he did not think that would be appro-

priate (r. app. p.'s 70-71).

The applicant "...was duly admitted and licensed as an Attorney and Counselor at Law by the Supreme Court of Missouri on the 1st day of September, 1979", (r. app. p. 101), and since September 8, 1979, is a member of the Bar of the United States District Court for the Western District of Missouri (r. app. p. 100), and is since May 19, 1981, a member of the Bar of the United States Court of Appeals for the Eighth Circuit. Applicant's application for admission to the Bar of this Court is sponsored by 2 attorneys (r. app. p. 98a) and another attorney moved (r. app. p. 99) for the admission of applicant.

Applicant on or about November 17, 1982, telephoned the clerk's office requesting an application for admission which was received a few days later (r. app. p. 83). The completed application was mailed on or about July 22, 1983, to

the clerk's office (r. app. p.'s 83,98-100,102,111). Which application included a letter stating, in part, to-wit:

> "On the Application for Admission to Practice I have taken a religious objection to the use of the social security number because of Revelations 1:3, 13:16-17, 14:9-12, 15:2-3; 2 Samuel 24:1-25; 1 Chronicles 21:1-30, and I consider myself a member of the Old Order Amish, having been born and baptized therein. Therefore, I trust that my application is acceptable", (r. app. p. 111).

A few days later applicant received a phone call from an assistant in the clerk's office stating that the clerk wanted applicant to supplement the application, that applicant should immediately obtain a certificate of good standing from the Supreme Court of Missouri, (r. app. p. 101) in that the certificate of goodstanding from the Western District of Missouri (r. app. p. 100) was not sufficient, and that applicant should indicate the social security number on the application (r. app. p. 83). Several days

later the application was returned, whereupon, applicant fully complied with the clerk's request, except for the social security number (r. app. p. 83). The application (r. app. p.'s 98-112) was sent Federal Express to the clerk's office on August 1, 1983, (r. app. p.'s 83,112) and the following day applicant phoned the clerk's office to inquire about the application, whereupon, an assistant read the letter (r. app. p.'s 6,113) then to be sent to applicant and stated that the applicant could speak directly with the clerk, applicant was then telephonically connected with the clerk who said there were already enough attorneys admitted to practice in the Supreme Court of the United States and that the applicant had a checking account number which was no different than having a social security number (r. app. p. 83). Several days later applicant received the letter and the returned application (r. app.

p.'s 68-69,83,98-113) from the clerk. Consequently, the applicant had to obtain other counsel to represent his clients in this Court on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, case no. 83-394, prepared by applicant (r. app. p. 84).

The clerk in his letter of August 2, 1983, stated "...Rule 5.2 requires that you complete the application form which has been approved by the Court", (r. app. p.'s 6,113,118). Rule 5.2 requires "...an executed copy of the form approved by the Court...", (r. app. p.'s 48,99a,117). The trial court found that regards the telephonic conservation between applicant and the clerk that the clerk stated "...that defendant saw no distinction between plaintiff's Social Security number and any other numerical identifier (as for example, plaintiff's checking account number), (r. app. p.

118). The evidence is that the clerk stated "...that plaintiff had a checking account number which was no different than having a social security number", (r. app. p. 83).

The applicant was assigned a social security number and did for a period of time use the number but since becoming aware of the Bibical Passages referring to the "mark of the beast", in the Book of Revelation, 1:3, 13:16-17, 14:9-12, 15:2-3, (r. app. p.'s 76,90,111), applicant has attempted in every way possible to sever his connections with the social security number assigned to him (r. app. p. 79). Applicant submits his income tax returns with out the social security number and is not aware of any situation inwhich he is currently using the social security number (r. app. p. 79). Applicant does not consider numbers that are used to identify an account, license, address, real estate plat, etc., to be

the "mark of the beast" because they are not numbers that are mandatory, omnipresent, a universal identifier, used to identify the individual, and they can be discarded. The cnly way the applicant can be identified is by "...his Name and his Father's Name...", Ibid. 14:1, (r. app. p. 79). In a trial court proceeding to have the social security number omitted from the driver's license, the court found that applicant's "convictions are deeply held and are firm and sincere", (r. app. p.'s 76,89-97 at 94).

The clerk suggests that the social security number is being used by this Court for the following:

1. To "...prevent fraud by persons who are not qualified to gain admission to the Bar...who might otherwise be admitted."

2. So "...that disciplinary actions by the Supreme Court will not be mistakenly directed at the wrong person."

3. As "...a means of easily verifying whether the person is a member of other courts' bars and the status of that membership." (r. app. p. 55).

On January 29, 1985, judgment was entered (app. B-32 - B-33; r. app. p. 134) on the District Court's order (app p.'s B-1 - B-31; r. app. p.'s 115-133) of January 28, 1985. The applicant timely, on February 22, 1985, filed in the District Court his Notice of Appeal to the United States Court of Appeals for the Eighth Circuit (r. app. p. 135) which Court on August 30, 1985, rendered it's opinion (app. p.'s A-1 - A-9) affirming the District Court and on the same day judgment was entered (app. p. A-10). Circuit jurisdiction is invoked under 28 USC 1291 under which the Circuit Court as a matter of right may review final decisions of the District Court.

ARGUMENT FOR GRANTING WRIT

The lower Courts have decided an important question of Federal law which effects this Court and should be settled by this Court. Namely, the procedure available in the event the clerk of this Court does not accept and process an application for admission to this Court's Bar. The lower Courts recognized the lack of procedure and nebulousness of their decision (app. p.'s A-4, B-13). Without an express procedure applicant has no alternative but to file this petition for a writ of certiorari. Hoping, that this Court will clarify the procedure and grant mandamus relief.

The limits of Section 7 of the "Privacy Act of 1974" should be defined to avoid any unnecessary delay in applying the mandate of 42 USC 408(h). Definition will also help to determine if damages are available under Section 7.

Applicant is not aware that this

Court has ever considered whether it is always necessary to exhaust the administrative remedies before filing a "Federal Tort Claims Act" suit in Court. Two exceptions to be considered are "futility of exhaustion" and "constitutional preemption". The lower Courts' decisions are in conflict with applicable decisions.

Matters the lower Courts' studiously ignored are the contacts, for in personam jurisdiction, associated with the clerk's office and authority. Perhaps this Court will reconsider 28 USC 1391(e) and apply the "plain meaning" to the statute for personal jurisdiction over a Federal official's individual capacity.

The District Court suggested improper venue (app. p. B-22) but the Circuit Court ignored the issue. This Court may wish to consider venue under both 28 USC 1391(b) & (e).

Finally, the District Court's deviation from the facts should be corrected.

I. WHETHER THE APPLICANT ASSERTED A PROPER BASIS FOR MANDAMUS JURISDICTION, TO-WIT:

A. DID THE APPLICANT ESTABLISH THE ELEMENTS JUSTIFYING MANDAMUS RELIEF;

"Three elements are applicable to test the appropriateness of granting mandamus:"

a. "a clear right in the plaintiff to the relief sought;"

b. "a plainly defined and peremtory duty on the part of the defendant to do the act in question; and"

c. "no other adequate remedy available."

Holmes v. United States Bd. of Parole, 541 F.2d 1243, 1247 (7th Cir. 1976). The lower Courts did not reach the question whether the applicant has a clear right to have his application, for admission to the Bar of this Court, accepted and processed, by the clerk, without the social security number and whether the clerk has a "...duty to perform that task," (app. p. B-12; r. app. p.'s 121-122),

but the Courts' reasoning for denying mandamus relief is that applicant has an "...adequate remedy other than mandamus", (app. p.'s A-4 - A-5, B-12; r. app. p. 122). In addition the District Court reasoned on reductio ad absurdum, (app. p. B-15; r. app. p.'s 123-124), which argument may be valid for attempts to compel this Court but not the clerk.

Applicant suggests that the Courts' analysis is incorrect that applicant has a "fully adequate remedy" (app. p.'s A-4, B-14; r. app. p. 123). The problem is whether this Court has jurisdiction to entertain, as the clerk declares, a "Motion To Compel The Clerk To Accept Application", (r. app. p. 69). The clerk "...has failed to cite any statute or rule expressly authorizing the Justices to review..." the clerks actions (app. p.'s A-4, B-13; r. app. p. 122). The lower Courts' citing of Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844)

(app. p. A-5, B-14; r. app. p.'s 122-123) is misplaced because that was a matter beginning at the trial level whereas here the clerk would have applicant initiate an original proceeding in this Court, a proceeding for which the clerk has failed to support with authority and which he did not suggest until the applicant filed a complaint in the District Court (r. app. p. 68-71).

Applicant has a clear right to have his application accepted and processed, as is expressed in Ex Parte Garland, 71 U.S. [4 Wall] 333, 379 (1866),

> "[t]he attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency", (emphasis added).

Therefore, only this Court can make a

judgment on the applicant's right to membership in it's Bar, not the clerk.

Obviously, the social security number has no rational connection with the applicant's ability to practice law. "Any qualification must have a rational connection with the applicant's fitness or capacity to practice law", Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-239 (1957). Accordingly, applicant has a clear right to have his application accepted and processed because the social security number cannot be used as a qualifying factor and this Court's Rule 5 does not even require a social security number on the application.

There is no valid argument for requiring the social security number for current applicants if prior applicants do not have to disclose their social security number before continuing to practice in this Court. There is no evidence that the reasons for requiring the social se-

curity number, as stated by the clerk (r. app. p. 55), have any relationship to reality. Thus there is no compelling state interest precluding applicant from membership on his refusal for religious reasons to disclose a social security number on his application. On a religious objection to an administrative matter "[a] state's interest in avoiding an administrative burden becomes compelling only when it presents administrative problems of such magnitude as to render the entire statutory scheme unworkable", Quaring v. Peterson, 728 F.2d 1121, 1127 (8th Cir. 1984), affirmed by an evenly divided Court Jensen v. Quaring, U.S. ____, (No. 83-1944, June 17, 1985). There being no administrative burden here further establishes that applicant has a clear right to mandamus relief. Also Section 7 of the "Privacy Act of 1974" mandates that the social security number cannot be considered on the applicant's

application because applicant refused to disclose (r. app. p.'s 6,68-69,75,98,111-113), this will be further explored in part II hereof.

That the clerk has a plainly defined ministerial duty to perform the act in question, is supported by this Court in Ex Parte Garland, 71 U.S. [4 Wall] 333, 378-379 (1866), because "...admission or...exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power". Therefore, the clerk, in exercising his mere ministerial power, can not exclude applicant from membership, because exclusion must be by "...the exercise of judicial power", Ibid. Applicant answered application question number "3. Social Security No. Religious Objection" (r. app. p. 98) and included a letter stating the following:

> "On the Application for Admission to Practice I have taken a religious objection to the use of the social security number because of Revelations 1:3, 13:16-17, 14:9-12, 15:2-3; 2 Samuel 24:1-25; 1 Chronciles

> 21:1-30, and I consider myself a member of the Old Order Amish, having been born and baptized therein. Therefore, I trust that my application is acceptable", (add. p. 24; app. p.'s 80,111).

By so filling in question number 3 applicant's application was in all respects complete and invoked the ministerial duty of the clerk to accept and process applicant's application. This is not a situation where applicant has failed to comply with a Court Rule and there is no order requiring the clerk to reject those applications not bearing a social security number. See Panko v. Rodak, 606 F.2d 168, 170 (7th Cir. 1979). In fact Supreme Court Rule 5.2 does not require the social security number as claimed by the clerk (r. app. p.'s 6,113), but merely requires "an executed copy of the form approved by the Court...". The word "executed" means signed, National Labor Rel. Bd. v. Waterfront Employees, 211 F.2d 946 (9th Cir. 1954).

B. IS THERE A PROCEDURE WHEREBY AN APPLICANT CAN FILE A MOTION IN THIS COURT TO COMPEL THE CLERK TO ACCEPT AND PROCESS AN APPLICATION FOR ADMISSION TO THE COURT'S BAR OR DOES THIS COURT LACK ORIGINAL JURISDICTION TO CONSIDER SUCH A MOTION;

"The jurisdiction of this Court as defined in Article III, [Sec.] 2, of the Constitution is either "original" or "appellate." Suits brought in the district courts of the United States, not of such character as to be within the original jurisdiction of this Court under the Constitution, are cognizable by it only in the exercise of its appellate jurisdiction", Ex Parte Peru, 318 U.S. 74, 86 (1970). The applicant suggests that this Court does not have original jurisdiction to entertain anything in the nature of a petition, application, or motion to compel the clerk to accept and process applicant's application, but the Supreme Court can compel the clerk "...in aid of it's appellate jurisdiction", Chandler v. Judicial Council, 398 U.S. 74, 86 (1970),

provided there is first "...a record made in a trial court", In Re Montes, 677 F.2d 415, 416 (5th Cir. 1982). Applicant is not inclined to willy-nilly file a motion in this Court and finds it necessary to have clearly established authority for a motion to compel the clerk and without such clear authority applicant has no adequate remedy other than mandamus relief. The only definable path to gain admission to this Court's Bar is by application pursuant to this Court's Rule 5.

C. "IN CASES CHARGING VIOLATION OF CONSTITUTIONAL RIGHTS SHOULD MANDAMUS BE CONSTRUED LIBERALLY;

"In cases charging a violation of constitutional rights, mandamus should be construed liberally." Holmes v. United States Bd. of Parole, 541 F.2d 1243, 1249 (7th Cir. 1976), where a claim of a due process violation invoked mandamus jurisdiction in the District Court. Here the applicant claims First and Fifth A-

mendments (free exercise, due process, equal protection) and Section 7 of the "Privacy Act of 1974" violations (r. app. p.'s 1,2,3,74,76,81,82). "Constitutional obligations as well as statutory duties are included within the perimeters of" 28 USC 1361, Holmes, supra, at 1249.

It is clear that applicant's constitutionally based right to access to this Court has been violated.

> "See Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (access to courts protected by due process clause); Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907) (access to courts is a privilege of American citizenship protected by the Fourteenth Amendment); Ginsburg v. Stern, 125 F.Supp. 596, 601 (W.D.Pa.1954) (clerk's failure to file papers would be a "patent" violation of constitutional rights) (dictum). Cf. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) (access to courts is "part of the right to petition protected by the First Amendment")." McCray v. State of Maryland, 456 F.2d 1, 6 (4th Cir. 1972).

Clearly, applicant will suffer irreparable harm absent intervention because

he will be relegated to a "second class citizen" as a result of his religious beliefs and thus be unable to fully practice the profession for which he is licensed. Such would do violence to the very basic concept of religious freedom in America and violate the First and Fifth Amendments of the United States Constitution and Section 7 of the "Privacy Act of 1974".

D. IS THE CLERK AMENABLE TO THE JURISDICTION CONFERRED UNDER 28 U.S.C. 1361 AND IN AID OF JURISDICTION CONFERRED UNDER 28 U.S.C 1651?

There are 2 statutes under which the District Court can grant mandamus relief, namely, 28 USC 1361 and 28 USC 1651. In the former the District Court has original jurisdiction in cases of mandamus and in the latter "...Courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pend-

ing, wherein jurisdiction has been acquired by other means and by other process", Covington Bridge Co. v. Hager, 203 U.S. 109. 110 (1906). This Court in Chandler v. Judicial Council, 398 U.S. 74, 87 note 8 (1970), specifically left open the question whether administrative bodies of the courts are within the jurisdiction of 28 USC 1361. But the dissent in Stafford v. Briggs, 444 U.S. 527, 551 (1979), indicated that the "Mandamus and Venue Act of 1962", 28 USC 1361 and 28 USC 1391(e), was not tied in with the "Administrative Procedure Act", 5 USC 701. In fact no limits are placed on the term "agency" of the "Mandamus and Venue Act of 1962". See Sen. Rep. No. 1992, 87th Cong. 2d Sess., reprinted in 2 U.S. Code Cong. & Adm. News pp. 866 & 2784, 2787 (1962). The District Court found that the clerk is "...within the literal ambit of..." Section 1361 (app. p. B-14; r. app. p. 123). And the Eighth Circuit

has affirmed District Court decisions under both Section 1361 and Section 1651. See Miller v. Ackerman, 488 F. 2d 920 (8th Cir. 1973), and Application of the United States For Order, Etc., 546 F.2d 243 (8th Cir. 1976), respectively.

II. WHETHER SECTION 7 OF THE "PRIVACY ACT OF 1974" IS APPLICABLE TO THE CASE AT BAR, TO-WIT:

A. DOES SECTION 7(a) PROHIBIT THE CLERK'S CONDUCT;

In footnote 4 of it's opinion the District Court stated "I have no occasion to consider plaintiff's assertion...that defendant has also violated the proscription against the use of Social Security numbers contained in [Section] 7 of the Privacy Act of 1974," (app. p. B-10; r. app. p. 120). Specifically the "Privacy Act of 1974" states "[i]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's

refusal to disclose his social security account number", Section 7(a), P.L. 93-579, 88 Stat. 1896, 1909, 5 USC 552a note, (emphasis added). Applicant has refused to disclose the social security number (r. app. 6,75,98,111-113), and there is no legislative authorization for requiring the social security number on the application for admission to the Bar of this Court. Therefore, the clerk engaged in unlawful conduct because he denied applicant's "...right, benefit, or privilege..." to have his application processed, as required by this Court's Rule 5 and case law. "Administrative practice alone, however, unsupported by any discrete legal grant of authority, is not enough to satisfy the requirements of section 7(a). Wolman v. United States Selective Service System, 501 F.Supp. 310, 311 (D.D.C.1980)." Doyle v. Wilson, 529 F.Supp. 1343, 1349 (D.Del. 1982).

Section 7(a) mandates that the clerk

could not consider applicant's refusal to disclose the social security number as a reason for not accepting and processing applicant's application. And, by not accepting and processing the application the clerk denied applicant's "...constitutionally based right of access..." to the Supreme Court, McCray v. State of Maryland, 456 F.2d 1, 6 (4th Cir. 1972). Therefore, the clerk is disclosing, using, or compelling the disclosure of the social security number in violation of the laws of the United States, 42 USC 408(h). The argument that Section 7 does not apply to this Court is unavailing because Section of the "Privacy Act of 1974" is not limited by the "agency" definition of Section 3, and Section 7 is merely entered as a note to 5 USC 552a.

B. ON APPLICATION FOR ADMISSION TO THIS COURT'S BAR, IS THE CLERK REQUIRED TO INFORM AN APPLICANT PURSUANT TO SECTION 7(b);

"Any Federal, State, or local govern-

ment agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it." Section 7(b), P.L. 93-579, 88 Stat. 1896, 1909, 5 USC 552a. The clerk did not so inform applicant, (r. app. p. 75), and the failure to so inform is a violation of the laws of the United States, Doe v. Sharp, 491 F.Supp. 346, 350 (D.Mass. 1980), Greater Cleveland Wel. Rights Org. v. Bauer, 462 F.Supp. 1313, 1321 (N.D. Ohio 1978), Doyle v. Wilson, 529 F.Supp. 1343, 1350 (D.Del. 1982), State v. Hughes, 442 N.E.2d 786, 789-790 (Ohio App. 1981). "Section 7(b) requires a meaningful disclosure", Doe, supra, at 350, Greater Cleveland Wel. Rights Org., supra, at 1321, and the requirement of Section 7(b) must be fulfilled before request is made

for the disclosure of the social security number, Doyle, supra, at 1350.

C. DID THE CLERK COMMIT A CRIME BY USING, DISCLOSING, OR COMPELLING THE DISCLOSURE OF A SOCIAL SECURITY NUMBER ASSIGNED TO APPLICANT;

"It is the purpose of [Section 7]...to block any further expansion of the use of Social Security numbers as a "universal identifier"", Wolman v. United States of America, Selective Service System, 501 F.Supp. 310 (D.D.C. 1980), and Congress enacted 42 USC 408(h) as a penal statute to punish those who in their quest to obtain the social security number violate the laws of the United States. 42 USC 408(h) mandates that "Whoever-- discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States shall be guilty of a felony and upon conviction thereof shall be fined not more than $5,000.00 or imprisoned for not more than five years,

or both." In light of 42 USC 408(h) there is a repelling repugnance for the clerk's proposition for a "Motion To Compel The Clerk To Accept Application", (r. app. p. 69).

D. IS SECTION 7 APPLICABLE AS A BASIS FOR DAMAGES AGAINST THE CLERK ON THE CLERK'S VIOLATION OF THE APPLICANT'S SECTION 7 RIGHTS?

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803)", Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971). Therefore, applicant suggests that there is a right of action directly under Section 7 against the clerk for damages, on the clerk's violation of the applicant's Section 7 rights. Otherwise, applicant would not have a remedy for the injuries caused by those violations. Under 42 USC 1983 there is a

civil remedy for violation of a federal statutory right, Maine v. Thiboutot, 448 U.S. 1 (1980). Likewise, the corresponding Bivens type action grants a civil remedy for violation of the Section 7 statutory rights.

III. WHETHER THE APPLICANT HAS A CLAIM FOR MONEY DAMAGES AGAINST THE CLERK ACTING IN HIS OFFICIAL CAPACITY, TO-WIT:

A. IS IT NECESSARY TO EXHAUST THE ADMINISTRATIVE REMEDIES UNDER THE "FEDERAL TORT CLAIMS ACT", 28 USC 2671, ET SEQ., BEFORE BRINGING A BIVENS ACTION ON VIOLATION OF CONSTITUTIONAL RIGHTS;

""We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum"", McNeese v. Board of Education, 373 U.S. 668, 674 note 6 (1963). "Such claims are entitled to be adjudicated in the federal courts",

Ibid. Therefore, because of the overwhelming Constitutional violations in the case at bar, applicant is not required to exhaust the administrative remedies under the "Federal Tort Claims Act" before bringing an action against the clerk in Federal court, Monroe v. Pape, 365 U.S. 167 (1961), McNeese, supra, Allee v. Medrano, 416 U.S. 802, 814 (1974).

B. DO THE ADMINISTRATIVE REMEDIES HAVE TO BE EXHAUSTED WHEN IT WOULD BE FUTILE TO DO SO;

In a Bivens action FTCA and Bivens are "...parallel, complementary causes of action", Carlson v. Green, 446 U.S. 14, 20 (1980), therefore, it would be futile to exhaust the administrative remedies under FTCA because the matter would have to be litigated, in any event, against the defendant in his individual capacity. But more importantly here the clerk has admitted that it would be futile to file a claim under FTCA, in that the clerk stated "[h]ad the plaintiff presented his

FTCA claim to the Administrative Office of the Courts, he would have been advised to file a motion to compel the clerk to process his application without a social security number" (r. app. 58). That kind of clear evidence of the result of an FTCA claim shows futility as a matter of law, Houghton v. Shafer, 392 U.S. 639, 640-641 (1968), Holmes v. United States Bd. of Parole, 541 F.2d 1243, 1247-1248 (7th Cir. 1976).

C. DID THE CLERK ACTING UNDER COLOR OF FEDERAL LAW DEPRIVE THE APPLICANT OF RIGHTS, PRIVILEGES, AND AMMUNITIES SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES?

The clerk did not accept and process applicant's application because applicant for religious reasons would not indicate a social security number on his application (r. app. p.'s 82,98,111-113). Thus applicant's Constitutional First and Fifth Amendment rights were violated together with the statutory rights under the "Privacy Act of 1974". Therefore, appli-

cant has a "Federal Tort Claims Act", 28 USC 2671, et seq., cause of action for damages against the clerk, in his official capacity, and a Bivens cause of action for damages against the clerk in his individual capacity, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), Carlson v. Green, 446 U.S. 14 (1980), Davis v. Passman, 442 U.S. 228 (1979).

As already discussed in part I, supra, applicant has a clear right to have his application accepted and processed and as discussed in part II, supra, because of Section 7 of the "Privacy Act of 1974" the clerk could also not refuse to accept and process applicant's application. Therefore, applicant was wrongfully denied access to this Court, McCray v. State of Maryland, 456 F.2d 1, 6 (4th Cir. 1972), and wrongfully denied admission to this Court's Bar in violation of the due process, equal protection, and

free exercise clauses of the constitution. "[T]he Fifth Amendment confers...a constitutional right to be free from illegal discrimination", Davis, supra, at 236. The clerk's actions are obviously a result of his discrimination of applicant because of applicant's religion and the reason for denying applicant access and admission to this Court. Thus the clerk violated both the First and Fifth Amendments, in that, the clerk violated applicant's right to "free exercise" of religion and denied applicant access and admission to the Court because of applicant's religion in violation of the due process and equal protection clauses. Even if the applicant had given no reason for refusing to disclose the social security number, and if the clerk would not have accepted and processed the application, the clerk would, nevertheless, have denied the applicant access and admission to this Court in viola-

tion of the due process clause.

The Eighth Circuit has held that the FTCA is applicable to employees of the federal judicial branch same as any other "federal employee", United States v. LaPotourel, 571 F.2d 405, 408-411 (8th Cir. en banc 1978). And, "[p]unitive damages are "a particular remedial mechanism normally available in the federal courts," Bivens, 403 U.S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights", Carlson, supra, at 22. "But punitive damages in an FTCA suit are statutorily prohibited", Ibid.

The clerk does not have immunity in this case because he owed applicant a plain and simple mandatory ministerial duty and that was to accept and process applicant's application for admission to this Court's Bar. Rule 5 says nothing about the necessity of a social security

number and even if it did Section 7 of the "Privacy Act of 1974" would prohibit the mandatory disclosure. However, the application does have a space for the number, (r. app. p. 98), and applicant appropriately filled in that space with a religious objection. Judicial immunity "will not be granted where the action complained of is ministerial", Norwood v. Solomon, 431 F.Supp. 380, 382 (E.D. Mo. 1977), McCray, supra, at 5, Kane v. Yung Won Han, 550 F.Supp. 120, 123 (E.D. N.Y. 1982).

The District Court held that it lacked subject matter jurisdiction over a claim for damages against the clerk acting in his official capacity, (app. p. B-17; r. app. 125), because applicant did not exhaust the administrative remedies under the FTCA. But then the Court entered summary judgment in favor of the clerk in his official capacity (app. p.'s B-19, B-31; r. app. p.'s 126,133). "It

is...error to rule on a summary judgment motion "or any other matter going to the merits" where a court determines that it lacks jurisdiction over the subject matter", Capitol Industries - EMI, Inc., v. Bennett, 681 F.2d 1107, 1118 (9th Cir. 1982).

IV. WHETHER THE DISTRICT COURT HAS PERSONAL JURISDICTION OVER THE CLERK WITH RESPECT TO THE APPLICANT'S DAMAGE CLAIMS ASSERTED AGAINST THE CLERK IN HIS INDIVIDUAL CAPACITY, TOWIT:

A. DO THE CLERK'S ACTS COME WITHIN THE "TORTIOUS ACT" AND "TRANSACTION OF BUSINESS" CATEGORIES OF SECTION 506.500, RSMO., AND WOULD THE EXERCISE OF IN PERSONAM JURISDICTION OVER THE CLERK BE CONSISTENT WITH DUE PROCESS;

Based on the clerk's "tortious" refusal to accept and process the applicant's application (r. app. p.'s 6,113), and, therefore, a "tortious" denial of applicant's right to access to this Court, McCray v. State of Maryland, 456 F.2d 1, 6 (4th Cir. 1972), and based on the clerk's "transaction of business" in the

forum state pursuant to his Office as clerk of the Supreme Court of the United States, the District Court had personal jurisdiction over the clerk. Since the clerk did not acknowledge service of process under Rule 4(c)(2)(C)(ii) (which acknowledgment would also comport with Rule 54.13(b) of the Mo.R.Civ.P.), the applicant served the clerk (r. app. 31-32) pursuant to Section 506.500, RSMo., which rule grants personal jurisdiction over a non-resident who does acts, for purposes of this action, as follows:

"(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;"

The requirements of Section 500.506, RSMo., are satisfied if a "tortious act" is committed in whole or in part in the State of Missouri, Empiregas, Inc., of Noel v. Hoover Ball & Bearing Co., 507

S.W.2d 657, 660 (Mo. 1974). It is irrelevant that the overt act may have occurred in the District of Columbia, Fulton v. Chicago, Rock Island & Pacific Railroad Co., 481 F.2d 326, 331 (8th Cir. 1973). In School Dist. of Kansas City v. State of Missouri, 460 F.Supp. 421, 433-434 (W.D. Mo. 1978), the court stated:

> "Missouri case law construes the phrase "commission of a tortious act within this state" to include extra-territorial acts which produce actionable consequences in Missouri. Missouri ex rel. Deere & Company v. Pinnell, 454 S.W.2d 889 (Mo. 1970); Missouri ex rel. Apco Oil Corporation v. Turpin, 490 S.W.2d 400 (Mo.App.1973). Thus, as in the classic example in the American Law Institute's Restatement (Second) of Conflict of Law [Sec.] 37(a) (1971),
>
> > ...one who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he had actually fired the bullet in the state."

The Court in School Dist of Kansas City, supra, at 434, considered how far the "authority" of the defendant extends for purposes of contacts with the forum

state. In the case at bar the clerk's authority extends to the State of Missouri and applicant contends that the courts have personal jurisdiction over the clerk anywhere within the territorial boundaries of the clerk's authority. The courts can take judicial notice that the clerk transacts business in the State of Missouri by virtue of his Office and that the clerk voluntarily entered into the Office of the Clerk of the Supreme Court of the United States. "This is not a case involving minimal contacts on a sporadic basis but a continuous business scheme involving potential obligations of citizens of this state", State Ex Inf. Danforth v. Reader's Digest, 527 S.W.2d 355, 358 (Mo. En Banc 1975), and the clerk, by virtue of his Office, invades the office of every attorney in the State of Missouri. In fact the clerk has a monopoly on the transaction of law business in the State of Missouri, involving

administrative Supreme Court matters. It is not necessary that the clerk have "...offices or officers in Missouri", State Ex Inf. Danforth, supra, at 357.

In addition to satisfying the jurisdictional requirements of 506.500, RSMo., personal jurisdiction over the clerk must also have "...certain minimum contacts with [Missouri] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, See Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283", State Ex Inf. Danforth, supra, at 358. In determining whether "due process" requirements are satisfied the Court considers the factors as follows:

> "(1) the nature and quality of the contacts with the forum state, (2) the quantity of the contacts with the forum state, (3) the relation of the cause of action to the contacts, (4) the interest of the forum state in providing a forum for its

residents, and (5) the convenience of the parties. Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969); Aftanase v. Economy Baler Company, 343 F.2d 187, 197 (8th Cir. 1965)." School Dist. of Kansas City, supra, at 433.

Important in the analysis of those factors it is necessary to keep in mind the matters already considered, (i.e. authority and office). The clerk's contacts with the State of Missouri are of an administrative nature at an intense level with a large quantity of contacts. The clerk obviously has numerous contacts with the State of Missouri on a daily bases during the week and this cause of action bears a direct relationship to those administrative contacts. The clerk's direct contacts with applicant are as follows:

1. The clerk sent an application form, for admission to this Court's Bar, to the applicant (r. app. p.'s 83,98-99a);

2. The clerk's office once called

applicant and requested additional information (r. app. p. 83);

3. The clerk spoke directly with the applicant via telephone, initiated by applicant (r. app. p. 83);

4. The clerk wrote applicant a letter stating that he refuses to accept and process applicant's application (r. app. p.'s 6,83,113);

5. The clerk's office twice returned applicant's application to applicant (r. app. p.'s 83,98-100,102,111,98-112).

The State of Missouri is obviously interested in providing a forum for redress of it's citizens injuries and the convenience of the parties is in the Western District of Missouri. It would cause great hardship on applicant to have to go to the District of Columbia but there is no hardship for the clerk to come to the Western District of Missouri because the government pays the clerk's expenses, Stafford v. Briggs, 444 U.S.

527, 544 (1979). There is an apparent advantage for the clerk not to have this suit close to where all his acquaintances are, thus avoiding enbarrassment. Therefore, due process and traditional notions of fair play and substantial justice are served in the Western District of Missouri but would be abrogated in the District of Columbia because it is questionable whether it is financially feasible for applicant to sue in the District of Columbia.

B. DOES 28 USC 1391(e) CONFER PERSONAL JURISDICTION, IN THE WESTERN DISTRICT OF MISSOURI, OVER THE CLERK IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES;

For the proposition that 28 USC 1391(e) supplies personal jurisdiction over the clerk in both his official and individual capacities, the applicant relies on the dissent in Stafford v. Briggs, 444 U.S. 527, 545-554 (1980). "Section 1391(e) provides in relevant part:

> "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority...may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action...
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that delivery of the summons and complaint to the officer...as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."" Stafford, at 546-547.

The plain meaning of Section 1391(e) is apparent as is stated by the dissent in Stafford, at 547. The fallacy of the majorities opinion, in Stafford at 544, is illustrated by this case, in that applicant is in a very different posture than what litigants normally are when suing individuals not connected with the Federal government, here applicant is up against a battery of government attorneys

being unable to afford a battery of attorneys for himself. Therefore, applicant suggests that the dissent is the correct opinion in Stafford that Section 1391(e) provides for venue and personal jurisdiction over a federal officer in a claim for damages against the officer in his official and individual capacities.

C. DID THE CLERK WAIVE PERSONAL JURISDICTION?

The clerk did not move to set aside the service of process (r. app. p.'s 11-13,14-16,17-17a,18-20,25-30,31-32,37-38), did not acknowledge service of process, Rule 4(c)(2)(C)(ii) of the Fed.R.-Civ.P., but then after the time limit executed and mailed the acknowledgment form to the process server (r. app. p.'s 25-30), and did not answer or otherwise plead to the applicant's complaint on or before October 1, 1984, pursuant to court order (r. app. p. 24) and the Federal Rules of Civil Procedure. The District

Court did, however, on October 26, 1984, grant the clerk "...leave of court to file responsive pleadings to plaintiff's complaint out of time", (r. app. 114), but by that time personal jurisdiction was already waived.

"...[A]n objection to jurisdiction over a person is usually deemed waived unless asserted by motion to set aside service of process...", O'Connor v. Western Freight Association, 202 F.Supp. 561, 564-565 (S.D.N.Y., 1962), similar procedure followed in State Ex Inf. Danforth v. Reader's Digest, 527 S.W.2d 355, 356 (Mo. En Banc 1975). "The United States or an officer or agency thereof shall serve an answer to the complaint...within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted", Fed. R. Civ. P. 12(a). The United States Attorney having been served on August 2, 1984, (r. app. p.'s 9,17a,), required

the clerk, in his official capacity, to answer or otherwise plead by October 1, 1984, but he did not do so and did not pursuant to the Court order of August 28, 1984, "...answer or otherwise plead to plaintiff's complaint...", by October 1, 1984, (r. app. p. 24). The clerk's motion to dismiss, or in the alternative, for summary judgment, was not filed until October 15, 1984, (r. app. p.'s 37-38). Therefore, the clerk waived personal jurisdiction. Nevertheless, the District Court has personal jurisdiction over the clerk as already suggested.

V. WHETHER VENUE IS PROPERLY IN THE WESTERN DISTRICT OF MISSOURI ON AN ACTION AGAINST THE CLERK IN THE CLERK'S OFFICIAL AND INDIVIDUAL CAPACITIES, TO-WIT:

A. DO BOTH 28 USC 1391(e) and 28 USC 1391(b) CONFER VENUE IN THE WESTERN DISTRICT OF MISSOURI;

"I think that [Sec.] 1391(e) means exactly what it says, and that its provisions present no constitutional problem whatever", dissent Stafford v. Briggs,

444 U.S. 527, 554 (1980). Accordingly, applicant suggests, as the dissent held, that Section 1391(e) provides for nationwide venue and in personam jurisdiction in a claim for damages against a federal officer in both the federal officer's official and individual capacities.

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law", 28 USC 1391(b). District court jurisdiction herein is founded on 28 USC 1331 and 28 USC 1361, therefore, for purposes of this action, the applicable part of Section 1391(b) is that venue is properly in the district where the "claim arose", and as will be discussed next the claim arose in the Western District of Missouri.

B. IS THE WESTERN DISTRICT OF MISSOURI THE PLACE OF INJURY AND, THEREFORE, WHERE THE CLAIM AROSE;

In Cochrane v. Iowa Beef Processors, 596 F.2d 254, 261-262 (8th Cir. 1979), cert. denied, 442 U.S. 921 (1979), the Court found that the place of injury for two plaintiff attorneys was in the district in which the attorneys lived, and, therefore, where the claim arose. "The place of injury..." is "...where the effect of the defendants' allegedly wrongful act occurred", Hodson v. A. H. Robins Co., Inc., 528 F.Supp. 809, 813 (E.D. Va. 1981), affirmed 715 F.2d 142 (4th Cir. 1983). In Hodson, at 813-815, the district court for purposes of where the claim arose used the same standards for both 28 USC 1391(a) and 1391(b), and in it's analysis indicated "the place of injury test" is the sole test, unless, there are many defendants and numerous districts where the claim may have arisen. The Western District is clearly where the effects of the clerk's wrongful acts are occurring because that is where the

applicant resides and has his law practice, (r. app. p.'s 98-112). Therefore, the Western District of Missouri is where the claim arose.

C. IS THE CONVENIENCE OF THE PARTIES IN THE WESTERN DISTRICT OF MISSOURI;

Although, it is clear that the claim arose in the Western District of Missouri additional weight in favor of that district is evident in considering the convenience of the parties, Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1979). It is convenient for the clerk to have this matter litigated in the Western District of Missouri because the government pays the clerk's expenses, Stafford v. Briggs, 444 U.S. 527, 544 (1979), and he will be able to have the matter litigated a distance from his acquaintances, thus avoiding embarrassment.

D. DID THE CLERK WAIVE VENUE?

The District Court did not enter any order regards improper venue but in

passing concluded, in footnote 7 of it's opinion, "...that even venue for this damage claim is improper", (app. p. B-22; app. p. 127). The clerk has not moved asserting improper venue (r. app. 37-38). A motion to dismiss omitting improper venue is regarded as a waiver of venue, Alderman v. Chrysler Corp., 480 F.Supp. 600, 603 (E.D. Va. 1979). Federal Rules of Civil Procedure 12(g) & 12(h)(1) make it clear that if a 12(b) motion is made and improper venue is omitted the defense cannot thereafter be asserted. The clerk did, however, assert "lack of venue" in the suggestions in support of the motion to dismiss, or in the alternative, for summary judgment (r. app. p. 62). Applicant suggests that merely asserting lack of venue in the suggestions is not sufficient to raise the issue.

The clerk has specifically waived venue in his official capacity (r. app. p. 62). The waiver of venue in the clerks

official capacity necessarily also waives venue in the clerk's individual capacity because the underlying facts are the same for both official and individual capacities. It would not be appropriate to litigate claims against the clerk in his official capacity in a separate court from the litigation against the clerk in his individual capacity.

As suggested in part IV., C., herein, the failure of the clerk to answer or otherwise plead by October 1, 1984, as required by the Rules and as required by court order (r. app. p. 24), also shows that the clerk waived venue together with his failure to acknowledge service of process (r. app. p.'s 25-30). Although, venue is waived it, nevertheless, is properly in the Western District of Missouri.

VI. WHETHER THE COURT'S FINDING IS NOT THE REASONABLE INFERENCES TO BE DRAWN FROM THE FACTS?

The District Court stated "...that

defendant [stated he] saw no distinction between plaintiff's Social Security number and any other numerical identifier (as for example, plaintiff's checking account number)" (app. p. B-6; r. app. p. 118). The evidence is that the clerk said "that plaintiff had a checking account number which was no different than having a social security number", (r. app. p. 83). The evidence was submitted by the applicant in his evidence in opposition to the clerk's motion to dismiss, or in the alternative, for summary judgment. And, which facts are unopposed by the clerk. Therefore, the "...reasonable inferences to be drawn from the facts", Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 623 (8th Cir. 1981), are as stated in the applicant's evidence (r. app. p. 83).

CONCLUSION

Applicant concludes as follows: that he asserts a proper basis for mandamus jurisdiction because he is able to establish the elements justifying such relief, this Court does not have original jurisdiction to entertain a motion to compel, the clerk is amenable to the jurisdiction generally conferred under 28 USC 1361 and in aid of jurisdiction under 28 USC 1651 and the Court may properly exercise it's jurisdiction to grant mandamus relief especially when, as here, there are constitutional violations; that applicant has stated a claim for damages against the clerk in his official capacity because when constitutional violations are asserted it is not necessary to exhaust the administrative remedies under the "Federal Tort Claims Act" and in any event it would be futile to exhaust; that the District Court has personal jurisdiction over the clerk because the cl-

erk waived in personam jurisdiction, the requirements of the State of Missouri "long arm statute" are fulfilled, in personam jurisdiction would comport with due process, and in any event 28 USC 1391(e) provides for nationwide venue and personal jurisdiction over federal officials in their official and individual capacities; that venue is properly in the Western District of Missouri because the clerk waived venue, that district is the place of injury, and, therefore, where the claim arose and the convenience of the parties is in that district; that the clerk violated the applicant's statutory rights under Section 7 of the "Privacy Act of 1974" as well as applicant's rights under the First and Fifth Amendments, and, therefore, applicant has claims for damages against the clerk in both the clerk's official and individual capacities; and that the clerk stated applicant had a checking account number

which was no different than having a social security number.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Ezra Eli Borntrager
520 Campbell
Kansas City, Missouri 64106
816/221-5682

Pro se Petitioner

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 85-1295

Ezra Eli Borntrager, Appellant,	*	
v.	*	On Appeal from the United States District Court for the Western District of Missouri.
Alexander L. Stevas, individually, and Joseph F. Spaniol, Jr., in his official capacity as Clerk of the Supreme Court of the United States, Appellees.	*	Affirmed August 30, 1985 OPINION

Submitted: July 10, 1985

Filed: August 30, 1985

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ARNOLD, Circuit Judge

In this action the plaintiff, Ezra

* Alexander Stevas was succeeded in office as Clerk of the Supreme Court of the United States by Joseph F. Spaniol, Jr., on August 1, 1985. Therefore, while

Eli Borntrager, a Missouri resident and attorney, complains that the Clerk of the Supreme Court of the United States illegally refused to accept and process his application for admission to the Supreme Court Bar. In submitting his application, the plaintiff refused on religious grounds to provide his social security number in the space reserved for that number on the application form. The defendant declined to process the application, informing the plaintiff that Rule 5.2 of the Supreme Court Rules required applicants to complete "the form approved by the Court." The plaintiff contends that the defendant's actions violated his rights under the First and Fifth Amendments of the Constitution and under §7 of the

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Mr. Stevas remains the defendant on claims against him individually, Mr. Spaniol is now the proper defendant on claims against the Clerk in his official capacity. Mr. Spaniol is therefore automatically substituted as a party appellee to the extent that a claim is made against the Clerk in his official capacity. See Fed. R. App. P. 43 (c)(1).

Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1909 (codified at 5 U.S.C. §552a note). The plaintiff asks for a writ of mandamus commanding the defendant to process his application and seeks to recover $6.1 million in actual and punitive damages against the defendant in his individual and official capacities.

The District Court[1] granted defendant's motion for summary judgment with respect to plaintiff's claims for mandamus and for damages against the defendant in his official capacity, and the defendant's motion to dismiss for lack of personal jurisdiction the damage claims against the defendant in his individual capacity, We affirm.[2]

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[1] The Hon. Ross T. Roberts, United States District Judge for the Western District of Missouri.

[2] After examining the briefs and record, we have determined that they adequately present the facts and legal arguments and that the decisional process would not be significantly aided by oral argument. The letter objection of plaintiff to the Clerk's letter informing him

Under 28 U.S.C. §1361, mandamus may issue against an officer of the United States only when the plaintiff has a clear right to relief, the defendant has a clear duty to perform the act in question, and the plaintiff has no adequate alternative remedy. Piledrivers' Local Union No. 2375 v. Smith, 695 F.2d 390, 392 (9th Cir. 1982). The District Court concluded that mandamus is unavailable here because the plaintiff has a fully adequate alternative remedy, a motion directed to the Supreme Court seeking review of the defendant's conduct. Although the Court recognized that no statute or rule expressly authorizes the Justices to conduct such a review it reasoned that the Supreme Court's power over its clerks is inherent in the nature of the relationship between the two, pointing out that "it is the right and duty of

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that the case had been tentatively set for no-argument disposition, is therefore overruled. See 8th Cir. R. 10(d)(3).

the court...to correct the irregularities of its officer and compel him to perform his duty." Griffin v. Thompson, 2 How. 244, 257 (1844). The District Court also observed that the defendant had stated in support of his motions that such a procedure was available to the plaintiff, and found that, given the defendant's position as Clerk of the Court, this statement should be accepted as authoritative. To this we would add that the Justices often engage in review of applications for admission to the Supreme Court Bar. See, e.g., In re Howard, 53 U.S.L. Week 3907 (U.S. July 1, 1985). We agree with the District Court that the availability of this alternative remedy mandates denial of mandamus relief.[3/]

We also concur in the District Co-

[3/] In the unlikely event that the plaintiff seeks review by the Supreme Court of the defendant's conduct and it refuses to entertain his motion, a mandamus action by the plaintiff in some federal district court might become appropriate.

urt's conclusion that the plaintiff failed to state a claim for damages against the defendant in his official capacity. As the District Court stated, a claim against the defendant in his official capacity is a claim against the United States, cognizable, if at all, only under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§2671 et seq. Under the FTCA, suit may not be instituted until a claimant has first presented his claim to the appropriate federal agency, and that agency has either denied the claim or failed to act upon it for six months. See 28 U.S.C. §2675. The plaintiff concedes that he has not met this requirement, but argues that complying with it would be "futile." However, this requirement is jurisdictional, Smith v. United States, 588 F.2d 1209, 1211 (8th Cir. 1978), and may not be waived, Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1311 (5th Cir.), cert. denied, 439 U.S.

1002 (1978). Accordingly, summary judgment for the defendant on this claim was entirely appropriate.

Finally, we believe that the District Court was correct in dismissing the plaintiff's damages claim against the defendant as an individual for lack of personal jurisdiction over the defendant, a resident of Virginia who performs his official duties in Washington, D.C. The plaintiff asserts that the District Court had jurisdiction over the defendant under 28 U.S.C. §1391(e)'s "nationwide venue" provisions or under Missouri's "long arm" statute, Mo. Rev. Stat. §506.500. The plaintiff's reliance on §1391(e) is unjustified because the Supreme Court has explicitly held that §1391(e) applies only to mandamus actions and not to suits for monetary relief against federal officials in their individual capacities, Stafford v. Briggs, 444 U.S. 527 (1980).

With respect tc the assertion of

jurisdiction under Missouri's long-arm statute, the District Court found that the defendant lacked sufficient contacts with Missouri to meet due-process requirements. The only specific contacts between the defendant and Missouri alleged by the plaintiff were a phone call from the defendant's deputy to the plaintiff and a letter from the defendant to the plaintiff; both of these actions came in response to defendant's application and related communications.

We agree with the District Court that these contacts were insufficient to support the exercise of personal jurisdiction. See Breiner Equipment Co. v. Dynaquip, Inc., 539 F. Supp. 204, 206 (E.D. Mo. 1982) ("Neither use of the mails, telephone calls, nor unilateral activities on the part of the plaintiff...is enough to subject the defendant to service of process in Missouri.").

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

FILED
AUG 30 1985
ROBERT D. ST. VRAIN
CLERK

JUDGMENT

No. 85-1295

Ezra Eli Borntrager, *
*
Appellant, *
*
vs. * Appeal from the United States District
* Court for the Western District of Missouri
Alexander L. Stevas, et al, *
*
Appellees. *

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties.

After consideration of the premises, it is ordered and adjudged that the appeal of the District Court is hereby affirmed in accordance with the opinion of this Court. August 30, 1985

Costs of appellee for briefs for recovery from appellant: $27.00

A true copy

ATTEST: /s/ Robert D. St. Vrain yml

CLERK, UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

EZRA ELI BORNTRAGER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 84-0840-CV-W-O
	)	
ALEXANDER L. STEVAS, individually, and ALEXANDER L. STEVAS, in his capacity as Clerk of the Supreme Court of the United States,	)	
	)	
Defendant.	)	

ORDER

ROBERTS, J.

The court has before it defendant's motion to dismiss or for summary judgment, asserting, inter alia, that the plaintiff has failed to meet the requirements for the court's mandamus jurisdiction, that plaintiff is otherwise unable to state a claim upon which relief may be granted, and that the court lacks jurisdiction over the person of the defendant. Having carefully considered the ev-

identiary materials submitted by the parties, as well as the extensive legal memoranda through which the parties have ably asserted their respective positions, defendant's motion to dismiss for lack of personal jurisdiction with respect to the damage claims asserted against him in his individual capacity, and defendant's motion for summary judgment with respect to all other claims, will be granted in accordance with the opinion which follows.

I.

Background

This controversy arises out of the acknowledged refusal of the defendant, as Clerk of the United States Supreme Court, to accept and process plaintiff's application for admission to the Bar thereof. It appears that the plaintiff, a Missouri resident and attorney-at-law, duly licensed to practice before the courts of that state, first sought admission

to the Supreme Court Bar in order to prosecute a petition for writ of certiorari on behalf of certain of his clients. Although there is no dispute that at all times material to this action plaintiff possessed and was aware that he possessed a Social Security number, he expressly declined to provide that number in the space reserved for that purpose in the application form, noting that he had a "religious objection" to the disclosure of that information. As the letter of transmittal accompanying this application and other items contained in plaintiff's response to the pending motions indicate, it is plaintiff's belief that the Social Security number assigned to him represents the "mark of the beast" adverted to in Revelations, 1:3, 13:16-17, 14:9-12, 15:2-3 (King James) and elsewhere in the Scriptures, and that the proposed use thereof as a means of identifying him on the Roll of Attorneys admitt-

ed to practice before the Court may result in his everlasting damnation.

Upon detecting this omission in the otherwise completed application form, one of defendant's deputies telephoned the plaintiff, instructing him to furnish the missing number and also submit proof that he was an attorney in good standing with the Missouri Supreme Court.[1] Shortly after this conversation plaintiff forwarded the requested certificate to defendant,

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1. The requisites for admission to the Bar of the Court, as well as the duties imposed upon the defendant with regard to the processing of such application are found in Supreme Court Rule 5, which in its entirety provides:

> "1. It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceeding the date of the application, and that the applicant appears to the Court to be of good moral and professional character.
>
> 2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other duly authorized official of

but by letter again declined to give his Social Security number. The following day, plaintiff telephoned the defendant's office and was advised that, having received plaintiff's latest correspondence,

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the proper court evidencing the applicant's admission to practice there and present good standing, and (2) an executed copy of the form approved by the Court and furnished by the Clerk containing (i) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

3. If the documents submitted by the applicant demonstrate that the applicant possesses the necessary qualifications, the Clerk shall so notify the applicant. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 45(e), the Clerk shall issue a certificate of admission. If the applicant desires, however, the applicant may be admitted in open court on oral motion by a member of the Bar, provided that the requirements for admission have been satisfied."

defendant had drafted a written response informing plaintiff that Rule 5.2 of the Court Rules required him "to complete the application form which has been approved by the court," and that if he did not provide his Social Security number defendant would "not accept and process" plaintiff's application for admission. Assuming that his representation of the facts is accurate, plaintiff then spoke with defendant personally, and was advised that there were "already enough attorneys" admitted to the Supreme Court Bar and that defendant saw no distinction between plaintiff's Social Security number and any other numerical identifier (as for example, plaintiff's checking account number).

The record does not disclose any further contact between the parties until nearly one year later when plaintiff filed the present action, seeking a writ of mandamus commanding the defendant to pro-

cess plaintiff's application, as well as actual and punitive damages against defendant individually and in his official capacity. According to the sworn declarations accompanying defendant's motion, Ms. Renee Wohlenhaus, a staff attorney with the United States Department of Justice, spoke with the plaintiff by telephone at or near that time and advised him that he could present his incomplete application to the Justices of the Court themselves through a "motion to compel the clerk to process an incomplete application" or similar device, and that in her view the instant action was unnecessary.[2]

Likewise, the affidavit submitted by

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2. Although she is counsel for the defendant, the affidavit of Ms. Wohlenhaus is unquestionably based upon personal knowledge of the facts stated therein and is therefore a proper subject for consideration under Fed R. Civ. P. 56. Mercantile Nat'l. Bank at Dallas v. Franklin Life Ins. Co., 248 F. 2d 57 (5th Cir. 1951), and see also 6 Moore's Federal Practice, 56.11[1-6].

defendant Stevas indicates that as Clerk of the Court it is one of his official functions to review applications for admission to the bar thereof, which if complete would then be forwarded to the Justices for action. It is defendant's position that plaintiff's application must be considered incomplete for the reason that plaintiff had expressly declined to furnish his Social Security number in the space in the application reserved therefor. Defendant also indicates, however, that the plaintiff has not yet filed a motion with the Court challenging the rejection of his application, and states further that any such motion would be placed before the Justices for their consideration. Finally, and of material importance on the question of this court's in personam jurisdiction, it appears that defendant, a resident of the State of Virginia who maintains his official station in the City

of Washington, D.C., had no contact with plaintiff in the State of Missouri, other than through the telephone calls and correspondence mentioned above.[3]

II.

Discussion

Although the parties have extensively discussed a number of matters, each of admitted relevance to the case at large, their arguments implicitly recognize that I may dispose of defendant's motions by addressing three comparatively succinct issues:[4]

First, does plaintiff assert a prop-

3. The unsubstantiated assertion in one of plaintiff's briefs, to the effect that "defendant has numerous contacts within the State of Missouri on a daily basis during the week," will be addressed in section 3 of the discussion which follows.

4. The disposition of defendant's motions does not require that I undertake the greater task of determining whether plaintiff's apparently individualized beliefs concerning his Social Security number are indeed "sincerely held and whether they are in his own scheme of things religious." U.S. v. Seeger, 380 U.S. 163, 185 (1965). Nor is it necessary for me to balance the allegedly "compelling gov-

er basis for this court's mandamus jurisdiction, a question answerable by determining whether (a) plaintiff appears able

ernmental interest" in the use of that number as a means of identifying attorneys sworn to the Supreme Court bar, against the essentially indirect burden which that places upon the free exercise of plaintiff's beliefs. See, e.g., United States v. Lee, 455 U.S. 252, 259 (1982).

Further, I have no occasion to consider plaintiff's assertion, appearing for the first time in his suggestions in opposition to the motions, that defendant has also violated the proscription against the use of Social Security numbers contained in §7 of the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1909 (codified at 5 U.S.C. §552a note), given the fact that the federal courts are expressly excluded from the schedule of governmental entities to which the Privacy Act applies, 5 U.S.C. §§551(1) and 552(e). While I acknowledge plaintiff's argument that the definition contained in these sections does not apply to §7 by virtue of the fact that it has been codified merely as a "note" to §522a, it is clear that even if the courts were somehow within the reach of §7, the defendant - whether as an individual or in his official capacity - is not a proper defendant in a civil action for damages under 5 U.S.C.. §522a(g)(i)(D), since such an action must be brought against the "agency" in its own name. Bruce v. U.S., 621 F. 2d 914, 916 n. 2 (8th Cir. 1980).

to establish the elements justifying such relief, (b) whether defendant is amenable to the jurisdiction generally conferred under 28 U.S.C. §1361, and (c), assuming that such jurisdiction indeed exists, whether this court may properly exercise its discretion to grant the relief sought by plaintiff?

Second, has the plaintiff stated a damages claim against the defendant in his "official" capacity?

Third and finally, with respect to plaintiff's claims for damages against defendant in his "individual" capacity, does this court have inpersonam jurisdiction over defendant?

A.

Mandamus.

Under the grant of jurisdiction contained in 28 U.S.C. §1361, mandamus may issue against an officer of the United States only where the plaintiff is able to demonstrate (a) that he has a clear

right to the relief requested; (b) that the defendant has a plainly defined and preemptory duty to act in question, and (c) that he has no adequate alternative remedy. Piledrivers Local Union No. 2375 v. Smith, 695 F. 2d 390 (9th Cir. 1982); Jones v. Alexander, 609 F. 2d 778 (5th Cir. 1980), cert. denied 449 U.S. 832 (1980); Panko v. Rodak, 606 F. 2d 168 (7th Cir. 1979).

Having carefully considered the allegations of the complaint, and the uncontroverted facts now of record, I am satisfied that plaintiff's request for mandamus must fail on at least two grounds. Without even reaching the questions of whether plaintiff possesses a clear right to have his ostensibly incomplete application accepted and processed, and whether defendant has a concomitant duty to perform that task, it is readily apparent that plaintiff has a fully adequate remedy other than mandamus. I refer here to

the "motion to compel acceptance of application" mentioned by defendant in support of the pending motion, which - given defendant's position as Clerk of the Court, and presumed familiarity with the forms and processes thereof - must be taken as an authoritative statement of the procedures available to plaintiff.[5] Further, while I recognize that the defendant has failed to cite any statute or rule expressly authorizing the Justices to review defendant's action, I do not rely upon his statements alone, for it is my independent judgment that the Court's power over its own clerk in this regard flows axiomatically from the nature of the relationship between the two. As clerk, the defendant is obviously "a subordinate officer of the court." U.S. v. Allred, 155 U.S. 591, 594 (1898).

5. Defendant's statements are analogous to those of an expert called to testify on a question of foreign law, and I believe to the same degree probative for purposes of Fed. R. Civ. P. 56. See 2 Wigmore, Evidence (Chadbourn Rev.) §564, p. 776.

That being the case, and since there is "inherent in any court a power to supervise the conduct of its officer," it follows that "upon application from those whose interests are involved," "it is the right and duty of the court ...to correct the irregularities of its officer, and to compell him to perform his duty." Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844). I believe, accordingly, that plaintiff has a fully adequate remedy in this case, in a motion directed to the Justices of the Court seeking a review of defendant's conduct, and that on this ground alone mandamus must be denied.

As a wholly separate matter, I note that other considerations would also compel me to withhold the writ in this case. Although in his capacity as Clerk of the Supreme Court the defendant is apparently within the literal ambit of §1361, "it seems axiomatic that a lower

court may not order the officers of a higher court to take action." Panko v. Rodak, supra, at 171 n. 6. Indeed, if the language of §1361 were taken literally, one would find it difficult to avoid the reductio ad absurdum posed by the Seventh Circuit in Panko v. Rodak, supra, to the effect that the statute would thereby also "allow a district court to issue mandamus directly against the Justices of the Supreme Court themselves." Id. It is thus my opinion, in concurrence with the Seventh Circuit's views in Panko, that an exercise of the mandamus jurisdiction ostensibly conferred under §1361 may properly be declined in a case involving officers of the Supreme Court, primarily as a matter of judicial discretion.[6] I believe this approach is

6. As an extraordinary remedy reserved only for extraordinary situations, In Re Cessna Distributorship Litigation, 537 F. 2d 64 (8th Cir. 1976), the issuance of mandamus is committed to the sound discretion of the court. Holmes v. U.S. Board of Parole, 541 F. 2d 1243 (7th

necessary to avoid the "unseemliness of the district judge interferring in the policies and procedures" of the Supreme Court, as well as to avoid the potentially insurmountable difficulty "of enforcing an order should the Supreme Court direct the Clerk's office to ignore it." Panko v. Rodak, supra.

I might view the situation differently in this regard, were it shown that defendant had unreasonably blocked all attempts to obtain relief from the Justices. Having carefully reviewed the facts of record, however, I am satisfied that there is nothing to suggest that defendant has taken action of that sort. On the contrary, and far from obstructing any effort by the plaintiff to bring his application before the Justices themselves, it is defendant through counsel who

Cir. 1976); Siegel v. Chicken Delight, 448 F. 2d 43 (10th Cir. 1971), cert. denied 405 U.S. 955 (1971); Prairie Band of Potowatomie Tribe, Etc. v. Udall, 355 F. 2d 364 (9th Cir. 1966), cert. denied 385 U.S. 831 (1966).

invited the plaintiff to file a motion for admission directly with the Court. Moreover, defendant has now sworn that he would in fact accept such a filing and submit it to the Court for consideration. Therefore, while this court may theoretically have the power to reach the defendant with mandamus, my discretionary refusal to do so, even if I were to find that the prerequisites therefor existed in this case, provides an alternative basis upon which the remedy will be denied.

B.

Damages Against the Defendant in His Official Capacity.

I also agree with defendant that plaintiff has failed to state a claim for damages against him in his official capacity. In fact, given the existing posture of matters, I would lack subject matter jurisdiction over any such claim.

Any damages claim against defendant

in his "official" capacity is a claim against the United States. Gilday v. Quinn, 547 F. Supp. 803, 807 (D. Mass. 1982); Robinson v. A & M Elec. Inc., 54 F. Supp. 302, 303 (D. N.M. 1982), aff'd 713 F. 2d 608 (10th Cir. 1983); Meyer Mfg. Co. v. Foley, 234 F. Supp. 732, 733 (S.D. Ia. 1964). As such, the claim is cognizable (if at all) only under the Federal Tort Claims Act, 28 U.S.C. §§2671 et seq. The Act provides, however, that suit may not be instituted thereunder until a claimant has first presented his claim to the appropriate federal agency, and that agency has either denied the claim or failed to act upon it within six months. See 28 U.S.C. §2675. This requirement is jurisdictional, Smith v. U.S., 588 F. 2d 1209, 1211 (8th Cir. 1978); Gillespie v. Civiletti, 629 F. 2d 637, 640 (9th Cir. 1980), and as such cannot be waived, Ducharme v. Merrill-National Laboratories, 574 F. 2d 1307, 1311

(5th Cir. 1978), cert. den. 439 U.S. 1002 (1978); Executive Jet Aviation, Inc. v. U.S., 507 F. 2d 508, 514-15 (6th Cir. 1974). Indeed, as a jurisdictional matter, compliance with this requirement is something which must be affirmatively pleaded in any suit under the Act. Gillespie v. Civiletti, supra; Altman v. Connolly, 456 F. 2d 1114, 1116 (2d Cir. 1972); Clayton v. Pazcoquin, 529 F. Supp. 245, 248-49 (W.D. Pa. 1981); Campbell v. U.S., 496 F. Supp. 36, 38 (E.D. Tenn. 1980). Here, plaintiff has not only failed to plead his compliance with §2675; he freely admits he has not met its requirement, and in fact appears to suggest that he has no intention of doing so.

In sum, the plaintiff has clearly failed to state a claim for damages against defendant in his official capacity. Summary judgment thereon in favor of the defendant is entirely in order.

C.

Damages Against Defendant Individually.

Summary judgment is also appropriate with respect to plaintiff's monetary claims against defendant individually, for the reason that this court lacks personal jurisdiction over him. Fed. R. Civ. P. 4(E), which authorizes service of process upon persons not inhabitants of or found within the state in which this court is held, provides the foundation for that essential prerequisites to personal jurisdiction. Under this subdivision, extraterritorial service may be accomplished where permitted by statute of the United States or an order of the court issued pursuant to such statute, or in the absence thereof in accordance with the applicable statute or rule of the state in which the district court sits. Since I have discovered no federal statute authorizing service upon the defendant, at least with respect to the monetary claims

now in issue,[7] plaintiff must accordingly rely upon the provision for extraterritorial service of process existing under the law of Missouri, specifically Mo. Rev. Stat. §506.500. See, e.g., Seig v. Karnes, 693 F. 2d 803 (8th Cir. 1982); and see, School Dist. of Kansas City v. State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978).

Under Mo. Rev. Stat. §506.500, com-

7. In support of his allegation that venue is proper in this district, plaintiff has cited 28 U.S.C. §1391(e), which provides inter alia that actions against officers or employees of the United States, acting in their official capacity, may be brought in any district in which the plaintiff resides, and that although service in such actions shall be as provided under the Federal Rules of Civil Procedure, service beyond the extraterritorial limits of the district may be made by certified mail. Although the subsection admittedly provides for nationwide service of process upon federal officers, I would agree with the holding of the Fifth Circuit in Duplantier v. U.S., 606 F. 2d 654 (5th Cir. 1979), cert. denied 449 U.S. 1076 (1979) that §1391(e) is only a venue statute and does not contain any grant of personal jurisdiction. Accord Kipperman v. McCone, 422 F. Supp. 860 (N.D. Cal. 1976) and Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337 (E.D. Mich. 1977) (construing 28 U.S.C. §1391(d).

monly referred to as Missouri's "long arm" statute, a non-resident or absent defendant will be subject to the jurisdiction of the Missouri courts, and thus of the district courts sitting within that state, whenever he has committed certain "acts" specifically enumerated in the statute. Stated in their entirety, those jurisdiction-creating acts are as follows:

1. The transaction of business within this state;

While I recognize the contrary position stated in Liberation News Service v. Eastland, 426 F. 2d 1379, 1382 (2nd Cir. 1970), to the effect that §1391(e) does confer both personal jurisdiction and venue, I would observe that the Second Circuit confined this holding to the executive branch of the federal government, expressly excluding both Congress and the judiciary. (See the definition of "agency" contained in 5 U.S.C. §701, upon which the court relied). Moreover, the Supreme Court has now explicitly held that §1391(e) applies only to mandamus actions and not to suits for monetary damages against federal officers in their individual capacities. Stafford v. Briggs, 444 U.S. 527 (1980). Therefore, far from aiding the plaintiff in establishing jurisdiction over the defendant, §1391(e) now compels the conclusion that even venue for this damage claim is improper, given the fact that I have already determined to deny mandamus relief.

2. The making of any contract within this state;

3. The commission of a tortious act within this state;

4. The ownership, use or possession of any real estate situated within this state;

5. The contracting to insure any person, property or risk located within this state;

6. Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

As §506.500 has been interpreted by the Missouri courts, it expands "the jurisdiction of the courts of this state over nonresident defendants to the extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States." State ex rel Deere & Co. v. Pinnell, 454 S.W. 2d 889, 892 (Mo. 1970) (en banc). As explain-

ed, however, in State ex rel. Caine v. Richardson, 600 S.W. 2d 82, 85 (Mo. App. 1980), "[s]uch a statement, of course, means the 'extent permissible' for the act or conduct set forth in the statute, and does not refer to the limits which might be permissible for other conduct not specified in the statute." Thus, in determining whether this court may assert in personam jurisdiction over the defendant here, a two part inquiry is involved: (1) whether defendant's alleged acts come within any of those categories specified in §506.500, and (2), if so, whether the exercise of in personam jurisdiction under such circumstances would be consistent with due process requirements. Sales Service, Inc. v. Daewoo Int'l. (American) Corp. 719 F. 2d 971, 972 (8th Cir. 1983); Scullin Steel Co. v. National Railway Utilization Corp., 676 F. 2d 309, 312 (8th Cir. 1982); Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F. 2d 651, 653

(8th Cir. 1982); State ex rel Newport v. Wiesman, 627 F. 2d 874, 877-88 (Mo. 1982) (en banc).

It is clear, given the present record, that plaintiff's only prospect of invoking any of the provisions of §506.500 is by demonstrating either that the defendant has committed a "tortious act" within this state,[8] or that his claim arises out of the defendant's "transaction of business" in this state. Fur-

8. Plaintiff's unsubstantiated suggestion that defendant's contacts within the State of Missouri are intense and that defendant "no doubt...has numerous contacts within the State of Missouri on a daily basis" does nothing to augment the record on which I must rule this motion. Moreover, even if plaintiff were to adduce other contacts, as for example the transaction of "business" within the State of Missouri, he would still be required to demonstrate that his cause of action arises from those activities within the forum which form the asserted basis for jurisdiction. Section 506.500(2). See Toro Co. v. Ballas Liq. Co., 572 F. 2d 1267 (8th Cir. 1968); and see also Wooldridge v. Beech Aircraft Corp., 479 F. Supp. 1041 (W.D. Mo. 1979); State ex rel Bank of Gering v. Schoenlaub, 540 S.W. 2d 31 (Mo. banc 1976), (both construing former §506.500(2) (now codified as §506.500(3)). It is suffic-

ther, since the facts show beyond doubt that defendant has committed no tortious acts in Missouri per se, plaintiff could succeed on the former theory only by invoking the principle that tortious acts can include extraterritorial conduct which produces actionable consequences in Missouri. See School Dist. of Kansas City v. State of Mo., supra, at 433; Mo. ex rel Deere & Co. v. Pinnell, supra, at 889. Even if I assume, however, that either such subsection of §506.500 could properly be applied to the facts of this case, it is clear that due process consid-

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ient to state that the facts suggest no realistic possibility that plaintiff could meet that burden. I also reject plaintiff's assertion, unsupported by any citation of authority, that defendant has submitted himself to the jurisdiction of this court by virtue of the fact that he had voluntarily returned the acknowledgment of service of process served upon him in accordance with Fed. R. Civ. P. 4(c)(C)(ii). Defendant's motion properly states and preserves his objections to personal jurisdiction within the contemplation of Fed. R. Civ. P.12(b)(2). That motion was expressly permitted to be filed out of time by order dated October 26, 1984.

erations would bar any assertion of in personam jurisdiction here.

The Eighth Circuit has identified five factors which must be considered in determining whether a non resident defendant has sufficient "minimum contacts" with the forum state, see International Shoe Co. v. Washington, 362 U.S. 310, 316 (1945); World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980), to satisfy due process requirements: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5), the convenience of the parties. Land-O-Nod Co. v. Bassett Furniture Industries, 708 F. 2d 1338, 1340 (8th Cir. 1983); Aaron Ferer & Sons Co. v. American Compressed Steel Co., 564 F. 2d 1206, 1209 (8th Cir. 1977). The latter

two factors are of secondary importance and are not determinative. Land-O-Nod Co. v. Bassett Furniture Industries, supra at 1340; Toro Co. v. Ballas Liquidating Co., 572 F. 2d 1267, 1270 (8th Cir. 1978).

Taking these factors in order, it is at once apparent that defendant has had no significant contact with Missouri as concerns plaintiff, since "[n]either use of the mails, telephone calls, or unilateral activities on the part of the plaintiff...is enough to subject the defendant to service of process in Missouri." Breiner Equip. Co. v. Dynaquip, Inc., 539 F. Supp. 204 (E.D. Mo. 1982); and see also, Osage Homestead Inc. v. Sutphin, 657 S.W. 2d 346 (Mo. App. 1983). Likewise, defendant's contacts within this state are in quantity no better than their quality, and hardly suggest that the defendant has by repeated acts, "purposely availed [himself] of the privilege of conducting activities in this

state." State ex rel Bank of Gering v. Schoenlaub, supra, 540 S.W. 2d at 31 (Mo. banc 1976). Nor is plaintiff's cause of action sufficiently related to those contacts to permit an exercise of personal jurisdiction. there is, for example, no indication that the defendant has "set in motion a course of action deliberately designed to move into the forum state in order to injure the plaintiff." See Pfeiffer v. Biomagnetic Medicine, 521 F. Supp. 1331, 1336 (W.D. Mo. 1981). To the contrary, it is plaintiff who has initiated the interaction between the two; defendant has done no more than respond. By the same token, the mere fact that defendant's extraterritorial actions may have had some unintended but foreseeable "effect" upon plaintiff in Missouri is insufficient as a predicate for jurisdiction, absent other contacts within the forum. See World Wide Volkswagen Corp. v. Woodson supra.

It simply does not appear from the facts now before me that defendant has had sufficient contacts within Missouri to warrant an exercise of jurisdiction over him, even assuming (as I have throughout this discussion) that defendant's refusal to process plaintiff's application has indeed had a tangible "effect" upon plaintiff in Missouri.[9] Therefore, in the absence of any reasonable basis for an exercise of personal jurisdiction, the damage claim asserted against defendant in his individual capacity will also be dismissed.

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9. I have no occasion to address the remaining two factors of the Eighth Circuit's analysis, since it readily appears that an exercise of jurisdiction would be unreasonable in this case, see Toro v. Ballas Liquidating Co., supra, nor to consider whether defendant's defense of judicial immunity applies to this claim.

ORDERS

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., shall be and is hereby granted with respect to plaintiff's claims for mandamus relief and for damages against defendant acting in his official capacity; and it is further

ORDERED that defendant's motion to dismiss plaintiff's complaint, for lack of personal jurisdiction over the defendant with respect to the damage claims asserted against defendant in his individual capacity, shall be and is hereby granted.

/s/ Ross T. Roberts
ROSS T. ROBERTS, DISTRICT JUDGE

DATED: JANUARY 28 ,1985.

JUDGMENT FOR CIVIL CASES

UNITED STATES DISTRICT COURT	District WESTERN DISTRICT OF MISSOURI
Case Title Ezra Eli Borntrager V. Alexander L. Stevas	Docket Number 84 0840 CV W 0 Name of Federal Judge or U.S. Magistrate The Hon. Ross T. Roberts

☐ Jury Verdict. This action came before the Court and a jury with the above named judge (magistrate) presiding. The issues have been duly tried and the jury has duly rendered its verdict.

☒ Decision by Court. This action came to determination before the Court with the above listed judge (magistrate) presiding. The issues have been duly determined and a decision has been duly rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment, pursuant to Rule 56, FRCivP, shall be and is hereby granted with respect to plaintiff's claims for mandamus relief and for damages against defendant acting in his official capacity; furhter ORDERED

that defendant's motion to dismiss plaintiff's complaint, for lack of personal jurisdiction over the defendant with respect to the damage claims asserted against defendant in his individual capacity, shall be and is hereby granted.

FILED
JAN 29, 1985
R. F. CONNOR, Clk.
U.S. DISTRICT COURT
WESTERN DISTRICT
OF MISSOURI
/s/ y

Entered On 1 - 29 - 85

Clerk	Date
R. F. CONNOR	Jan. 29, 1985
(By) Deputy Clerk /s/ Shirley Smith	

Certificate or Affidavit
of Service

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Ezra Eli Borntrager, state that, on the 25th, day of October, 1985, pursuant to Rule 28, Rules of the Supreme Court, I personally served copies of the foregoing, Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, on each of the parties required to be served herein as follows:

By leaving 3 copies with the receptionist at the Office of Robert G. Ulrich, United States Attorney, 549 United States Courthouse, 811 Grand, Kansas City, Missouri, and directing the receptionist to give the copies to the Assistant United States Attorney Frederick O. Griffin, Jr., who is Counsel accepting service for Respondents.

All parties required to be served have been served.

Ezra Eli Borntrager
520 Campbell
Kansas City, Missouri 64106
816/221-5682

Pro se Petitioner

Subscribed and affirmed to before me on this _____ day of _____, 1985.

_____
Notary Public